

MEMORANDUM

DATE: November 9, 1972

RE: Timpanogos Canal Company Claim

The waters of the Provo River are distributed to the various owners of water rights in accordance with the awards set forth in an action entitled "Provo Reservoir Company, et al. v. Provo City, et al.", Civil No. 2888, Utah County, and commonly referred to as the "Provo River Decree". The distribution is carried out by the Provo River Water Commissioner, who is an individual appointed by the State Engineer upon recommendation of the water users. This appointment is made pursuant to Section 73-5-1 Utah Code Annotated 1953, as amended. The Water Commissioner is paid by the State Engineer with funds which are collected from the water users, and the Water Commissioner is subject to the direction and control of the State Engineer.

In the past, it has been a rather general practice for the Water Commissioner to contact the major canal companies when it is brought to his attention that there is going to be any substantial change in the flow of the Provo River because of stream regulation. Prior to September 12, 1969, the Utah Power & Light Company advised Mr. Hugh A. McKellar, Provo River Water Commissioner, that the Company intended to release additional water into the Provo River on or about September 12th. Upon receipt of this communication, Mr. McKellar attempted to contact the Water Master for the Timpanogos Canal Company, but was unable to do so. Because of the press of other matters, he made no further attempt to contact the Water Master prior to the time the water was released. On September 12th the Power Company by-passed approximately 60 second feet of water for a twelve-hour period. The Timpanogos Canal is located on the Provo River downstream from the diversion and by-pass facilities of the Power Company. The Canal Company maintains a diversion dam across the Provo River which can—and on occasion does—divert the entire flow of the River. The present investigation has not disclosed whether the entire flow of the Provo River was being diverted into the Timpanogos Canal prior to the release by Utah Power & Light Company. However, a representative of the State Engineer is of the opinion that the Canal Company's diversion dam was diverting the entire flow of the River at that time. In any event, the water by-

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passed by the Utah Power & Light Company was diverted into the Timpanogos Canal, causing the canal to overflow its banks. In one place, the bank of the canal was washed out and water, mud, and other debris was deposited in the orchard of an adjoining property owner. The Company has since restored the canal bank and removed the debris, and the claim which is being made against the State for this action is \$1,288.01. The items which make up this claim are tabulated on an Affidavit which accompanies the claim of the Timpanogos Canal Company.

It should be noted that the manner in which the Canal Company has set up its diversion dam and diverting works is such that during low flows the entire flow of the creek is diverted into their canal including flow fluctuations often in excess of their decreed rights. Had the Company's diversion facilities been designed so as to limit the diversion rate, the entire flow released by the Power Company would not have been diverted into their canal. Other diversion works on the system are generally designed in such manner that large flow fluctuations are by-passed down river.

Secondly it should also be noted that the Company has not installed a waste gate (by-pass) on the upper end of the canal. A waste gate (by-pass) is a desirable feature to be installed on a canal to enable returning excess flows to the river and to prevent the canal from overflowing.

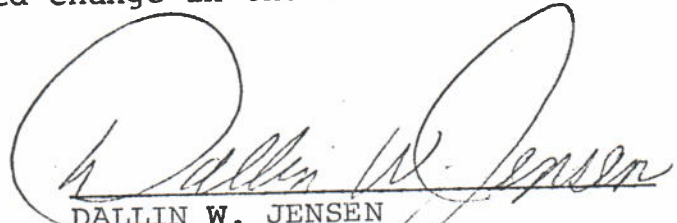
It should also be noted that the State Engineer does not believe that the Commissioner has a direct responsibility to advise users of anticipated changes in the flow of the stream, whether occurring naturally or as a result of the action of other water users. But, as pointed out above, the practice of advising certain of the major canal companies of excessive changes in the flow of the stream has been the general practice on the Provo River System for many years, and the practice has been relied upon by the water users.

The claim of the Timpanogos Canal Company was submitted to the State Engineer on December 15, 1969, and to the office of the Attorney General on April 3, 1970, but was not approved by the Department. The claim was then submitted to the Board of Examiners on January 7, 1971. It does not appear that any action has been taken by the Board of Examiners.

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RECOMMENDATION:

While it does not appear that the Timpanogos Canal Company is entitled to recovery under the terms and provisions of the Utah Governmental Unity Act, Chapter 30, Title 73, it does seem that under the circumstances and as a matter of fairness and equity the Company has a claim which should be favorably considered by the Board of Examiners and the Legislature because of the failure of the Provo River Water Commissioner to notify the Company of the anticipated change in the flow of the Provo River on September 12, 1969.



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